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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 201

HARRY SACHER, RICHARD GLADSTEIN, GEORGE W. CROCKETT, JR., LOUIS F. McCABE, ABRAHAM J. ISSERMAN AND EUGENE DENNIS,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PAUL L. ROSS,
MARTIN POPPER,
Counsel for petitioners.

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MOTION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Harry Sacher, Richard Gladstein, George W. Crockett, Jr., Louis F. McCabe, Abraham J. Isserman and Eugene Dennis respectfully move this Court for a rehearing of the order made herein on June 4, 1951 denying the petition herein for a writ of certiorari to the Court of Appeals for the Second Circuit to review its judgment in this case.

Statement

On July 14, 1950 there was filed in this Court a petition for writ of certiorari to the Court of Appeals for the Second Circuit to review its judgment in this case.

The following eight questions were presented by said petition:

1. Whether the summary conviction and sentencing of petitioners for criminal contempt, without notice, hearing, or other opportunity to answer or defend, were consistent with due process and within the power of the trial judge where a substantial time had elapsed since the occurrence of the alleged contemptuous incidents and the trial in which they occurred had been concluded.

2. Whether the trial judge could lawfully convict and punish petitioners without notice or hearing after the conclusion of a nine-months trial on the basis of episodes combed from the record of the trial and endowed in the contempt certificate with a quality and significance which the trial judge did not ascribe to them at the time of their occurrence.

3. Whether, under the circumstances stated in 1 and 2, the trial judge could lawfully convict and punish petitioners for acts considered to be disrespectful to and critical of him.

4. Whether the trial judge could so convict and punish petitioners where he found that they had agreed to engage in conduct intended to impair his health and where he had expressed the belief that they were his personal enemies ready to attack him physically and seeking to discredit him as a judge.

5. Whether it was erroneous for the Court of Appeals to affirm the convictions and sentences on the basis of par-

ticular acts set forth in Specifications II through XL, when the actual basis for the convictions and sentences was the trial judge's erroneous finding of a conspiracy, which the Court of Appeals reversed.

6. Whether the contempt certificate violates Rule 42 (a) of the Rules of Criminal Procedure by incorporating by reference the entire record in the trial of *United States v. Dennis, et al.*

7. Whether the record supports the convictions and sentences imposed on petitioners.

8. Whether under all the circumstances the punishments imposed are excessive.

On June 4, 1951 this Court, by a majority of the Justices, made an order denying the aforementioned petition. Justices Black and Douglas declared that they were in favor of granting the petition.

Jurisdiction of This Court

This motion for rehearing is made pursuant to Rule 33 of the Rules of the Supreme Court of the United States as amended on October 13, 1947.

The grounds on which this motion is made is that there are substantial grounds available to petitioners for the granting of the petition which were not previously presented.

Reasons for Granting the Motion and Petition

1. Petitioners are innocent of the alleged contempts of which they were convicted.

The nature and quality of the conduct of the petitioners are not adequately revealed and cannot be determined from the face of the contempt certificate made by the trial judge

(1 R 17-73).[1] The convictions which the Court of Appeals affirmed are all based on colloquies between the trial judge and the various petitioners. A proper appraisal of these colloquies and a determination of whether or not they constitute contempt can only be made when due and proper regard is had for the relevant context in which they appear. When so regarded, it becomes clear that none of the items cited in the contempt certificate and affirmed by the Court of Appeals constitutes a punishable contempt.

The time available to the petitioners for the filing of this motion does not permit of the preparation and printing of an original detailed analysis of each of the specifications in the contempt certificate. To support their contention that they are innocent of the contempts of which they have been convicted, petitioners are, therefore, submitting herewith as an exhibit, a true copy of a brief submitted by petitioners Sacher and Isserman to Hon. Carroll C. Hincks, United States District Judge for the District of Connecticut, in disciplinary proceedings instituted against said petitioners, which brief contains, among other things, an analysis and discussion of all but two of the Specifications contained in the contempt certificate, namely Specifications XX and XXI, which were not cited in said disciplinary proceedings. Although said brief is, in the main, directed to the question of the fitness of petitioners Sacher and Isserman to remain members of the bar of the United States District Court for the Southern District of New York, the analysis and discussion therein of each of the specifications in the contempt certificate show that the question of the innocence of all of the petitioners herein is of such sub-

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[1] The record in this case includes the record of the trial in *United States* v. *Dennis, et al.*, D.C. S.D.N.Y., No. C 128-87. We use "D.R." to refer to the *Dennis* record, and "R." to refer to other portions of the record in this case. Record references are preceded by a numeral indicating the volume cited.

stantiality as, in our respectful view, to require review by this Court.

The following table shows the volume and pages of the aforementioned brief at which each Specification affirmed by the Court of Appeals is discussed, together with the pertinent portions of the *Dennis* record which constitute the context in which each specification is to be read:

Specification	Brief Vol.	Brief Page	Dennis Record Vol.	Dennis Record Page
II	II	30–33	1	376–385
III	IV	A20–A22	2	928–934
IV	IV	A13–A19	2	988–1038
V	II	64–70	2	1047–61
VI	II	178–186	2	1083–1092
VII	III	375–381	2	1132–1142
VIII	II	12–17	2	1657–71
IX	IV	A46–49	3	2079–2106
X	IV	A50–52	3	2383–2385
XI	IV	A53	3	2403–2404
XII	III	382–384	3	2525–2529
XIII	IV	139–141	5	3933–3945
XIV	II	107–116	5	4029–60
XVI	II	49–54	6	4787–89
XVII	IV	A187–189	6	4804–06
XIX	II	55–58	7	4961–70
XX	Not treated			
XXI	Not treated			
XXII	II	204–209	8	6250–6280
XXIII	II	135	8	6401–02
XXIV	IV	A103	8	6520–21
XXV	II	122–123	9	6554–6565
XXVI	IV	A59–69	9	6760–61
XXVII	III	385–394	9	6833–6853
XXVIII	II	62–63	9	6936–7
XXIX	II	147–151	8	6400–09
			9	7085–87
XXX	II	152–3	10	8045
XXXI	II	248–50	12	9403–05
	III	351–355	12	9365–9377
XXXII	III	356–372	12	9508–9541
XXXIII	III	319	12	9731
XXXIV	IV	A66	13	9886–7
XXXV	IV	A124	14	10748
XXXVI	II	268–69	14	10851–56
XXXVII	II	97–98	14	11212–16
XXXVIII	IV	A67–71	15	11417–23
XXXIX	II	169–172	15	11432–33

The petition for the issuance of a writ of certiorari herein included among the questions presented that of whether the record supported the convictions and sentences imposed

on petitioners. But the innocence of the petitioners was neither argued or documented therein because the convictions and punishments of petitioners, imposed as they were, without notice or opportunity to be heard long after the occurrence of all of the alleged contempts, appeared to be in such conflict with the prior decisions of this Court in the *Terry, Cooke, Michael* and *Oliver* cases, as to lead to the confident belief that certiorari would be granted on the authority of those cases.

2. A second substantial ground available to the petitioners herein which was not presented by the petition for certiorari is the following:

The contempt certificate clearly shows that the trial judge's conviction and punishment of the petitioners rested, in part, on his belief and finding that the petitioners had entered into a conspiracy to impair his health. To the extent that the trial judge acted on such belief and finding, he was clearly acting as a judge in his own cause; and his personal interest therein was such as to render any judgment he might make devoid of due process.

The trial judge declared as follows in the contempt certificate (1 R. 17):

> "By way of preliminary, I may say that I would have overlooked or at most merely reprimanded counsel for conduct which appeared to be the result of the heat of controversy or of that zeal in the defense of a client or in one's own defense which might understandably have caused one to overstep the bounds of strict propriety. *Before the trial had progressed very far, however, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, deliberately entered into a cold and calculating manner, to do and say these things for the purpose of:* (1) causing such delay and confusion as to make it impos-

sible to go on with the trial; (2) provoking incidents which they intended would result in a mistrial; and (3) *impairing my health so that the trial could not continue.*" (Italics supplied.)

Surely, it requires no citation of authority to support the proposition that, under our jurisprudence, no judge can, consistently with the requirements of due process, sit in judgment of and mete out punishment to any person or persons accused of inflicting or conspiring to inflict personal injury on the judge. The summary contempt power is no exception to this requirement of due process. That power may be exercised only to vindicate the dignity and authority of the court as an institution. When a judge exercises the power to that end he may be presumed to have acted with the impartiality and disinterestedness essential to due process. Where, as in the instant case, it is apparent from the judge's declarations in the contempt certificate that an alleged conspiracy to inflict personal injury on him was an element in his determination of the guilt and punishment of the petitioners, his decision can no longer be said to have been made solely for the vindication of the authority and dignity of the Court as an institution nor can it be said to be possessed of that impartiality and disinterestedness which due process requires.

When the contempt certificate herein is read and construed in the light of long-established canons of construction usually applied to written instruments, including judgments, it is clear that the trial judge adjudged the petitioners guilty of and punished them for the alleged contempts attributed to them because of his finding of a conspiracy which included as one of its integral purposes the impairment of his health. In his dissenting opinion in the Court of Appeals, Judge Clark said (182 F. 2d 416, 464):

"There are not only the practical difficulties of the judge's own statement that he was punishing for the

conspiracy rather than for acts which might well be considered as due to the heat of trial, and of making sense out of his distribution of penalties, except upon his own rationale of conspiracy."

And in 60 Yale Law Journal 1, 10, Professors Harper and Haber, referring to the preamble of the contempt certificate, from which we have above quoted, write as follows:

> "These portions of the preamble seem to indicate that conspiracy was the gist of the contempt of which the defendants were declared guilty under the entire certificate. An actual evil purpose—i.e., in addition to the mere voluntary doing of the overt acts—which is, with some notable exceptions, held essential to the crime of conspiracy; is here explicitly made an element of the crime. The agreement is said to have been 'deliberately entered into [by the defendants] in a cold and calculating manner' for a series of corrupt and evil purposes."

It requires a credulity that is characteristic neither of the American bar nor of the American people, to believe that a judge who solemnly declared, that the petitioners herein had entered into a conspiracy to impair his health, was not notivated, in part at least, by that consideration in determining their guilt and fixing their punishment. For never in America's history have sentences so severe as those imposed upon the petitioners been imposed on lawyers for courtroom conduct.

In *Tumey* v. *Ohio*, 273 U.S. 510 this Court reversed a judgment fining the plaintiff-in-error $100 on the ground that he had been deprived of due process of law because the mayor of the village, who tried him, had received the sum of $12.00 for his fees and costs. At page 532 the Court said:

> "There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it, but the requirement of due process

> of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

Who will say that prison sentences, ranging from 1 to 6 months, imposed on American lawyers by a judge who believed them to be engaged in a conspiracy to do him personal injury are more in accord with the requirements of due process than is a $100 fine imposed by a judge confronted with the prospect of receiving $12 in fees and costs upon imposing such fine?

The petitioners maintain that they are innocent of wrongdoing. But even if it could be said, upon a fair, impartial and dispassionate examination of the record, that their guilt was established, the sentences imposed on them would have to be held to have been imposed without due process because of the trial judge's personal interest in the redress of and the exaction of retribution for what he conceived to be a conspiracy whose purposes included the impairment of his health. For as was said in the *Tumey* case at page 535:

> "It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined $100 which was the minimum amount, and therefore *that he can not complain of a lack of due process, either in his conviction or in the amount of the judgment.* The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge." (Italics supplied)

The action of the trial judge cannot be justified on any theory of necessity. At the time he punished petitioners

the trial had been completed and the verdict of the jury returned. There was, therefore, no reason why the matter could not be assigned to another judge of the Southern District of New York who would be free to act in accordance with all requirements of due process.

In *Cooke* v. *United States*, 267 U.S. 517, 539 Chief Justice Taft, writing for a unanimous court, referred with approval to the following views of the Circuit Court of Appeals in *Toledo Newspaper Co.* v. *United States*, 237 Fed. 986, 988:

> "* * * it is of the greatest importance that contempt proceedings be put as far as possible beyond the reach of even unjust adverse criticism * * *"

Despite the repressive atmosphere that hangs over contemporary America, reasoned criticism has already been made of the conviction and punishment of these petitioners. Reference has already been made to the article of Professors Harper and Haber in 60 Yale Law Journal 1. An article in the Stanford Law Review of July 1950, 2 Stanford Law Review 763, referring to the decision of the Court of Appeals, declares at page 769:

> "The attitude of the majority in the *Sacher* case is disturbing. The great dangers inherent in summary contempt have always been recognized; it is a tribute to our judiciary that the power has generally been exercised with restraint. Case after case warns that the power must vigilantly be confined to the narrow area in which it is necessary. The vigilance should not be relaxed, particularly not in these times, when members of political minorities appear more and more often in the defendant's docket in widely publicized and heated trials, and when it is more essential than ever to keep our court procedures scrupulously fair. Regardless of how much Sacher and his fellow lawyers may have corrupted the administration of justice, there can be no justification for punishing them in a needlessly arbitrary manner. Summary contempt should be exer-

cised only when the judicial process cannot be protected by ordinary criminal procedure."

And in 99 University of Pennsylvania Law Review 540, a note on the instant case, as decided in the Court of Appeals, declares at page 543:

> "* * * it is in just such a case as this that the personality of the judge is likely to be under the severest strain and the temptation to arbitrary action the greatest. For this reason the instant court has approved an extension of arbitrary power which is neither doctrinally nor practically necessary, and which is open to dangerous abuse."

It is respectfully submitted that in view of what is above set forth, this case presents a classic instance for the exercise by this Court of that supervision of the administration of criminal justice in the Federal courts of which it spoke in the following terms in *McNabb* v. *United States*, 318 U.S. 332, 340:

> "In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us. For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those 'fundamental principles of liberty and justice,' *Herbert* v. *Louisiana*, 272 U.S. 312, 316, which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."

Conclusion

A rehearing of the order denying the petition for writ of certiorari should be granted and on such rehearing the writ

of certiorari should be issued and the judgment below reversed.

Respectfully submitted,

PAUL L. ROSS,
MARTIN POPPER,
150 Broadway, New York, N. Y.
by MARTIN POPPER

The undersigned counsel for the petitioners herein hereby certify that the foregoing petition is presented in good faith and not for delay, and said petition is restricted to the grounds above specified.

Dated: New York, N. Y., June 15th, 1951.

PAUL L. ROSS,
MARTIN POPPER

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